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ALM Labs, Inc., Cougar Life Inc., and Noel Biderman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

AVID LIFE MEDIA, INC., an Ontario
corporation, and AVID DATING
LIFE, INC., an Ontario corporation dba
ASHLEY MADISON,

Plaintiffs,

vs.

DIGISEC MEDIA AS dba
www.victoriamilan.com, a Norway
company; SIGURD VEDAL, an
individual, and DOES 1 through 10,

Defendants

DIGISEC LIMITED, a Cyprus
company,

Plaintiff,

vs.

AVID LIFE MEDIA, INC., an Ontario
Corporation; AVID DATING LIFE,
INC., an Ontario corporation; ALM
LABS, INC., an Ontario corporation,
COUGAR LIFE INC., an Ontario
corporation, NOEL BIDERMAN, an
individual, and DOES 1 through 10,

Defendants

Case No. 12-cv-08602-JAK (FMOx)
[Lead Case]
[Consolidated with Case No.13-CV-
01849-JAK (MANx)]

**NOTICE OF MOTION AND
MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION;
SUPPORTING DECLARATIONS
OF NOEL BIDERMAN AND
RIZWAN JIWAN ARE
SUBMITTED HEREWITH**

DATE: DECEMBER 2, 2013
TIME: 8:30 a.m.
ROOM: 750
[Assigned to John A. Kronstadt]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2013, at 8:30 a.m. or as soon thereafter as the Motion may be heard, in the courtroom of the Honorable John A. Kronstadt, located in Room 750 at 255 East Temple Street, Los Angeles, California, Defendants Noel Biderman, and ALM Labs, Inc. (collectively, the “Affiliates”), will and hereby do move the Court for an Order pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure dismissing the claim against them for lack of personal jurisdiction. This Motion is brought following a conference of counsel that occurred on October 1, 2013.

The Affiliates simply have no jurisdictionally significant contacts with the State of California, so personal jurisdiction against them is lacking. Plaintiff Digisec Ltd.’s (“Digisec”) boilerplate allegations are insufficient, particularly in light of the Affiliates’ denials, to meet its burden of demonstrating that personal jurisdiction is proper.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities and Declarations of Noel Biderman and Rizwan Jiwan attached hereto, all pleadings and papers on file in this action, all matters of which the Court may take judicial notice, and such further evidence and argument as the Court may consider at the hearing on this Motion.

Dated: October 10, 2013

RAINES FELDMAN LLP

By: /s/ Miles J. Feldman

MILES J. FELDMAN
LAITH D. MOSELY
NICOLE L. HALLE

Attorneys for Avid Life Media, Inc.,
Avid Dating Life, Inc. dba Ashley Madison,
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Biderman

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CAL. CIV. PROC. CODE § 410.103

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Digisec is a Cypress company, with its principal place of business in Cypress. Digisec sues a Canadian citizen and a Canadian corporation that have never done business in California. No personal jurisdiction exists here because neither of these parties purposely directed activities at California (or the Central District) that had any jurisdictionally significant effect in California.

Digisec alleges that Defendants' allegedly used some websites (the "Disputed Websites") to refer visitors to the Ashley Madison website (the "Ashley Madison Site").

The Disputed Websites had no effect at all in California because there is no evidence that *anyone* (other than maybe Digisec's counsel) ever visited them from California. Personal jurisdiction is tested in the first instance by the allegations of the Complaint. But there is no allegation that the Defendants' alleged misdeeds resulted in the acquisition of even one additional customer anywhere in California who would otherwise have become a customer of Digisec. And in fact, the evidence demonstrates that not a single person anywhere in California ever "clicked through" the Disputed Websites to visit the Ashley Madison Site. The lack of a California "effect" mandates dismissal of the Affiliates for lack of personal jurisdiction.

II.

FACTS

A. The Burdens of Persuasion and Production

In a Rule 12(b) Motion challenging personal jurisdiction, plaintiff bears the ultimate burden of persuasion. *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements, Ltd.*, 328 F.3d 1128-29 (9th Cir. 2003). However, the Court is not restricted to the pleadings but may instead consider the parties' evidentiary showings. *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The Court

1 must accept uncontroverted allegations in the pleadings. *Doe v. Unocal Corp.*, 248
2 F.3d 915, 922 (9th Cir. 2001). On the other hand, to the extent defendant submits
3 evidence disputing an allegation, the Court should disregard the allegation and
4 resolve the motion on the basis of the evidentiary record. *Amba Mktg. Sys., Inc. v.*
5 *Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977) (affirming a personal jurisdiction
6 dismissal where plaintiff failed to substantiate its allegation that the allegedly
7 wrongful sales occurred in the forum state).

8 In the end, the plaintiff bears the burden of establishing personal jurisdiction
9 by a preponderance of the evidence. *Data Disc*, 557 F.2d at 1285 n.2. Digisec
10 cannot meet that burden.

11 **B. Factual Discussion**

12 Digisec is a Cyprus company with its principal place of business in Cyprus.
13 *Digisec Complaint*, ¶ 2. Its jurisdictional allegations are largely boilerplate. With
14 no supporting facts whatsoever, Digisec simply alleges that ALM Labs, Inc.,
15 (“ALM Labs”) has “systematic and continuous contacts with this District.” *Digisec*
16 *Complaint*, ¶ 13. Digisec also alleges that ALM Labs seeks and receives customers
17 from this District and receives payments from customers in this District. *Id.*
18 Finally, Digisec alleges that ALM Labs has “committed tortious acts that it knew or
19 should have known would cause injury to Digisec in this District.” *Id.*

20 Digisec alleges that California may assert jurisdiction over Mr. Biderman
21 because he “exercises individual control over the other Defendant entities identified
22 above, is the moving, active conscious force that caused all of the wrongful acts
23 alleged in this Complaint to occur, and personally directed and caused Avid Life
24 Media, Inc. and Avid Dating Life, Inc. to initiate the related lawsuit . . . in this
25 District.” *Digisec Complaint*, ¶ 15.

26 In fact, ALM Labs does not have “systematic and continuous contacts” with
27 this District. To the contrary, it has no contacts with this District at all. ALM Labs
28 is incorporated and headquartered in Canada, not California. *Rizwan Jiwan*

1 *Declaration* (“*Jiwan Decl.*”) ¶ 3. It has no offices in California, nor do any of its
 2 employees reside in California. *Jiwan Decl.*, ¶ 3. Indeed, ALM Labs does no
 3 business anywhere in the United States, much less in California. *Jiwan Decl.*, ¶ 3.

4 Digisec properly makes no attempt at all to claim that Mr. Biderman is
 5 subject to general jurisdiction in California. Mr. Biderman is a Canadian citizen
 6 who lives in Canada. *Biderman Decl.*, ¶ 3. He has done no business in California in
 7 his individual capacity. *Id.* ¶ 4. Although he did authorize the filing of the related
 8 lawsuit in this District, he did so in his capacity as an officer of Avid Life Media,
 9 Inc., and Avid Dating Life, Inc., not in his individual capacity. *Id.* ¶ 6.

10 Digisec suffered no injury in California. Indeed, the alleged wrongful acts
 11 caused no injury to Digisec anywhere in the United States. During the time period
 12 when the Disputed Websites might have been viewed by the public, no one
 13 anywhere in the United States “clicked through” the Disputed Websites to the
 14 Ashley Madison Site. *Jiwan Decl.*, ¶¶ 9-10. Thus, in particular, no one in
 15 California clicked through from the Disputed Websites to the Ashley Madison Site.

16 At bottom, none of the alleged harm occurred in California.

17 III.

18 ANALYSIS

19 A. Neither Defendant Is Subject to General Jurisdiction in California.

20 Personal jurisdiction is ordinarily a two-step analysis. First, the Court must
 21 ascertain whether personal jurisdiction exists under state law. Second, the Court
 22 must confirm that the exercise of personal jurisdiction comports with the
 23 requirements of due process. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482,
 24 1484 (9th Cir. 1993). However, under California law personal jurisdiction extends
 25 to the full extent permitted by due process. CAL. CIV. PROC. CODE § 410.10. Thus,
 26 in this case both steps collapse to a single inquiry: whether personal jurisdiction
 27 over defendants is consistent with due process.

Personal jurisdiction may be established via either general jurisdiction or specific jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). General jurisdiction exists when a defendant's contacts with the forum state are so substantial and pervasive as to approximate physical presence in the state. *Bancroft & Masters v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Because general personal jurisdiction permits a court to exercise jurisdiction over matters that are unrelated to the defendant's forum activities, the standard is "fairly high." *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986). And of course, it is black letter law that each defendant's contacts with the forum must be assessed separately. *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) (holding that personal jurisdiction existed over a law partnership but not over any of the individual partners).

Digisec's halfhearted attempt to allege that ALM Labs is subject to general jurisdiction is wholly unavailing. ALM Labs does no business in California. It has neither offices nor employees here. Contrary to Digisec's allegation that ALM Labs has "systematic and continuous" contacts with California, in fact ALM Labs has no contacts at all. And Digisec has made no effort at all to claim that Mr. Biderman, a Canadian citizen who lives in Canada and has never done business in California in his individual capacity, is subject to general jurisdiction here. Neither ALM Labs nor Mr. Biderman is subject to general jurisdiction in California.

B. ALM Labs Is Not Subject to Specific Jurisdiction in California Because Digisec Suffered No Harm in California.

The evidence submitted by ALM Labs refutes Digisec's allegations that ALM Labs (a) has systematic and continuous contact with California, or (b) has sought or obtained customers from California. Thus, the only remaining jurisdictional allegation is Digisec's claim that ALM Labs "has committed tortious acts that it knew or should have known would cause injury to Digisec in" California. *Digisec Complaint*, ¶ 13.

1 Digisec bears the burden of proving two separate elements to establish
2 specific jurisdiction. First, the non-resident defendants (the Affiliates) must
3 purposefully direct activities toward the forum or purposefully avail themselves of
4 the privilege of conducting activities within the forum. Second, the claim must arise
5 out of or relate to each Affiliate's forum-related activities. *Schwarzenegger v. Fred*
6 *Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). If Digisec sustains the
7 burden, the Affiliates would have the opportunity to prove that the exercise of
8 jurisdiction is nonetheless unreasonable. *Id.*

9 Purposeful availment and purposeful direction are two different concepts. *Id.*
10 Where, as here, a case sounds in tort rather than contract, the first prong is treated as
11 "an 'effects' test that focuses on the forum in which the defendant's actions were
12 felt." *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199,
13 12006 (9th Cir. 2006) (en banc). And in any event, ALM Labs, which has done no
14 business in California and has no offices or employees in California, has not
15 purposefully availed itself of the protection of California law.

16 Purposeful direction, in turn, is measured by a three-pronged test. The
17 defendant must commit an intentional act, expressly aimed at the forum state, and
18 cause harm, which is in fact suffered, and which defendant knows is likely to be
19 suffered, in the forum state. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th
20 Cir. 2006) (affirming a dismissal for lack of personal jurisdiction where plaintiff
21 alleged that a foreign defendant registered and used an infringing domain name).

22 Here, there is neither express aiming at California nor harm felt in California.
23 It bears emphasis that Digisec is located in Cyprus, not California, so harm at its
24 headquarters is not felt in California, or anywhere else within the United States.
25 ALM Labs does no business in California, or anywhere else in the United States, so
26 it was not attempting to acquire California customers or in any other way expressly
27 aiming any conduct at California (or anywhere else in the United States). And
28 because no one within California, or anywhere else in the United States, clicked

1 through the Disputed Websites, no harm occurred in California or the United States.
2 Thus, Digisec cannot prove either purposeful availment or purposeful direction, so
3 ALM Labs is not subject to personal jurisdiction in California.

4 **C. Mr. Biderman Is Not Subject to Specific Jurisdiction in California.**

5 Digisec relies on two separate allegations in its effort to establish personal
6 jurisdiction over Mr. Biderman. First, it alleges that Mr. Biderman is personally
7 responsible for the wrongdoing alleged in the Complaint. Second, Digisec alleges
8 that Mr. Biderman “personally directed and caused” Avid Life Media, Inc., and
9 Avid Dating Life, Inc., to file the related lawsuit against Digisec in this District.
10 Neither allegation establishes personal jurisdiction over Mr. Biderman.

11 **1. The Same Analysis that Defeats Personal Jurisdiction over**
12 **ALM Labs Applies with Equal Force to Mr. Biderman.**

13 Digisec first alleges that Mr. Biderman is subject to personal jurisdiction
14 because he is personally responsible for the alleged misconduct that supposedly
15 caused harm to Digisec in California. But the same analysis discussed in connection
16 with ALM Labs also defeats personal jurisdiction over Mr. Biderman. There was no
17 express aiming at California (or anywhere else in the United States) because Digisec
18 is located in Cyprus, and because no one in California or anywhere else in the
19 United States clicked through the Disputed Websites to reach the Ashley Madison
20 Site.

21 **2. The Related Lawsuit Does Not Provide a Basis for Personal**
22 **Jurisdiction over Mr. Biderman.**

23 The other basis asserted by Digisec is the contention that Mr. Biderman
24 supposedly “personally directed and caused” the filing of the Related Lawsuit in this
25 District. But that allegation is jurisdictionally *irrelevant* for two separate and
26 independent reasons. First, Digisec’s current claim does not arise out of or relate to
27 the filing of the related lawsuit, so they fail to satisfy the second prong of the
28 specific jurisdiction analysis. The related lawsuit complains that the so-called

1 “genuine Victoria Milan Site” is confusingly similar to the Ashley Madison Site.
2 Neither the substance of that lawsuit nor the fact of its filing has anything to do with
3 the Disputed Websites. In other words, the conflict over the Disputed Websites
4 could have occurred whether or not a lawsuit had been filed regarding the content of
5 the Victoria Milan Website.

6 Second, Mr. Biderman’s actions in connection with the related lawsuit are not
7 chargeable to him personally. The evidence demonstrates that Mr. Biderman
8 authorized the lawsuit in his capacity as a corporate officer, *not* his individual
9 capacity. Moreover, because he is not a party to the related lawsuit, the result of the
10 lawsuit will not redound to his benefit, but to that of the plaintiff companies.

11 In the absence of wrongful conduct (and of course, the filing of a lawsuit is
12 not wrongful conduct), “[a] corporate officer who has contact with a forum only
13 with regard to the performance of his official duties is not subject to personal
14 jurisdiction in that forum.” *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376, 1379
15 (9th Cir. 1981) (quotation marks omitted). Thus, in *Chem Lab Prods., Inc. v.*
16 *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977), the Ninth Circuit concluded that a
17 corporate president who authorized the delivery of a cease-and-desist letter into the
18 forum did not thereby subject himself to personal jurisdiction. If the rule were
19 otherwise, corporate officers would have a strong incentive to file corporate lawsuits
20 on their “home turf,” even when other considerations might suggest a different and
21 more convenient forum.

22 This rule squarely applies to Mr. Biderman. His only forum-related contact,
23 as alleged in the Complaint, is his decision, *as a corporate officer*, to authorize the
24 filing of a lawsuit in California. That decision should not and did not render him
25 personally vulnerable to suit in California. Mr. Biderman is not subject to personal
26 jurisdiction in California, and the claims against him should be dismissed on that
27 basis.

IV.

CONCLUSION

For all of the foregoing reasons, ALM Labs and Mr. Biderman respectfully request that the Court dismiss all claims against them for lack of personal jurisdiction.

Dated: October 10, 2013

RAINES FELDMAN LLP

By: /s/ Miles J. Feldman

MILES J. FELDMAN

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